FILED
SID J. WHITE
MAR 12 1993
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,262

KIM HIGGINS,

Respondent.

______________________________/

PETITIONER'S BRIEF ON THE MERITS

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ISSUE/CERTIFIED QUESTION

DOES THE HOLDING IN EUTSEY V. STATE, 383 SO.2D 219 (FLA. 1980) THAT THE STATE HAS NO BURDEN OF PROOF AS TO WHETHER THE CONVICTIONS NECESSARY FOR HABITUAL FELONY OFFENDER SENTENCING HAVE BEEN PARDONED OR SET ASIDE, IN THAT THEY ARE "AFFIRMATIVE DEFENSES AVAILABLE TO [A DEFENDANT]," EUTSEY AT 226, RELIEVE THE TRIAL COURT OF ITS STATUTORY OBLIGATION TO MAKE FINDINGS REGARDING THOSE FACTORS, IF THE DEFENDANT DOES NOT AFFIRMATIVELY RAISE, AS A DEFENSE, THAT THE QUALIFYING CONVICTIONS PROVIDED BY THE STATE HAVE BEEN PARDONED OR SET ASIDE?

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, appellee below, will be referred to herein as "the State." Respondent, Kim Higgins, appellant below and defendant in the trial court, will be referred to herein as "Higgins." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On April 24, 1991, Higgins was charged by information in Case no. 91-411-D with seven counts of uttering a forged instrument (R 3-10); and in Case no. 91-461-D with four counts of uttering a forged instrument (R 12-16). On May 9, 1991, Higgins was charged by amended information in Case no. 91-530-D with one count of felony defrauding an innkeeper (R 24-25). On April 25, 1991, the State filed notices of intention to seek habitual felony offender or habitual violent felony offender status in Case nos. 91-411-D (R 11) and 91-461-D (R 17). On July 22, 1991, Higgins entered a plea of nolo contendere on all charges with the understanding that the State would seek habitual violent felony offender status with a cap of twenty years and a minimum mandatory term of imprisonment of five years (R 73-77).

At the sentencing hearing below, the prosecutor introduced certified copies of Higgins's seven previous felony convictions (R 81-84). These certified copies were of two January 25, 1989 grand theft convictions; a May 1, 1986 conviction for grand theft auto; a May 1, 1986 conviction for burglary of a structure; a November 1, 1984 conviction for burglary of a structure; and a May 1, 1986 conviction for aggravated assault (R 29-68). Higgins specifically stated that he had no objection to the admission of these certified copies (R 81-84). Further, when the prosecutor stated that Higgins met each of the specific criteria for sentencing under the habitual violent felony offender provision, and that none of Higgins's prior convictions had been "set aside

by appeal, post-conviction, or pardon," Higgins did not contest any of the prosecutor's conclusions (R 83-84).

After hearing argument from counsel for both the State and Higgins concerning the sentence it should impose, the trial court stated:

> I'm going to classify him as an habitual violent felony offender. I'm going to adjudicate him guilty of each of these offenses in the case 91-411. Count I, I'm going to sentence him to ten (10) years as an habitual violent felony offender. On the other counts I'm going to sentence him to ten years, they'll all be concurrent with each other. Case 91-461, adjudicate him guilty, sentence him to ten (10) years as an habitual violent felony offender. They will be concurrent with each other, but consecutive to the counts in 411. Case 91-530, defrauding an innkeeper, adjudicate him guilty, sentence him to five (5) years, concurrent with the cases in 461, for a total incarceration of twenty (20) years. You have 30 days to appeal. If you wish to and you cannot afford a lawyer, I'll appoint a lawyer for that purpose.
>
> [PROSECUTOR]: Judge, are you going to announce the five-year minimum mandatory on 91-411?
>
> COURT: Yeah, I should do that. There is a five year minimum mandatory on that case.

(R 86-87). On September 10, 1991, the court entered its written judgments and sentences, which were consistent with its oral pronouncements (R 89-122). Thereafter, on September 12, 1991, Higgins timely filed a notice of appeal (R 69).

On appeal, Higgins argued that the trial court had erred in sentencing him as a habitual violent felony offender without making any of the findings it was required to make pursuant to

Section 775.084(1)(b) and (3)(d), Fla. Stat. (1991). The State responded that the sentence imposed by the trial court should be affirmed because the court's failure to make the statutory findings resulted in no harm whatsoever to Higgins. On January 11, 1993, the First District entered its written opinion reversing Higgins's sentence based on the trial court's failure to make the requisite findings before sentencing Higgins as a habitual violent felony offender. However, the First District certified the following question of great public importance:

> Does the holding in Eutsey v. State, 383 So.2d 219 (Fla. 1980) that the state has no burden of proof as to whether the convictions necessary for habitual felony offender sentencing have been pardoned or set aside, in that they are "affirmative defenses available to [a defendant]," Eutsey at 226, relieve the trial court of its statutory obligation to make findings regarding those factors, if the defendant does not affirmatively raise, as a defense, that the qualifying convictions provided by the state have been pardoned or set aside?

On February 10, 1993, the State timely filed a notice to invoke this Court's discretionary jurisdiction based on the certified question. The instant proceeding follows.

SUMMARY OF ARGUMENT

Although the trial court did not make specific findings before sentencing Higgins as a habitual violent felony offender, the error was harmless. The unrefuted and unobjected-to documentary and testimonial evidence in the record shows that Higgins qualified for sentencing as a habitual violent felony offender.

ARGUMENT

ISSUE/CERTIFIED QUESTION

> DOES THE HOLDING IN EUTSEY V. STATE, 383 SO.2D 219 (FLA. 1980) THAT THE STATE HAS NO BURDEN OF PROOF AS TO WHETHER THE CONVICTIONS NECESSARY FOR HABITUAL FELONY OFFENDER SENTENCING HAVE BEEN PARDONED OR SET ASIDE, IN THAT THEY ARE "AFFIRMATIVE DEFENSES AVAILABLE TO [A DEFENDANT]," EUTSEY AT 226, RELIEVE THE TRIAL COURT OF ITS STATUTORY OBLIGATION TO MAKE FINDINGS REGARDING THOSE FACTORS, IF THE DEFENDANT DOES NOT AFFIRMATIVELY RAISE, AS A DEFENSE, THAT THE QUALIFYING CONVICTIONS PROVIDED BY THE STATE HAVE BEEN PARDONED OR SET ASIDE?

In State v. Rucker, 18 Fla. L. Weekly S93 (Fla. Feb. 4, 1993), this Court recently answered the certified question presented in the instant case, stating, "We answer in the negative and quash the decision of the district court." Id. at S93. The Court elaborated:

> In Eutsey v. State, 383 So.2d 219 (Fla. 1980), we ruled that the burden is on the defendant to assert a pardon or set aside as an affirmative defense. Although this ruling does not relieve a court of its obligation to make the findings required by section 775.084, we conclude that where the State has introduced unrebutted evidence -- such as certified copies -- of the defendant's prior convictions, a court may infer that there has been no pardon or set aside. In such a case, a court's failure to make these ministerial findings is subject to harmless error analysis.

Id. at S94.

In the instant case, the trial court did not make specific findings of fact to support its decision that Higgins qualified for sentencing as a habitual violent felony offender. However,

the documentary and testimonial evidence contained in the record on appeal amply supports the trial court's conclusion that Higgins was so qualified. The record contains certified copies of seven prior felony convictions, one of them a violent felony. Higgins not only failed to object to the admission of these certified copies; he affirmatively stated that he had no objection to the admission of the documents. Moreover, Higgins wholly failed to object when the prosecutor stated that Higgins met each and every criteria for sentencing under the habitual violent felony offender provision. Higgins thus conceded, through his silence, that he met the criteria for sentencing as a habitual violent felony offender. Because the factual basis for the sentence the trial court imposed is amply supported by the record, the court's failure to announce its specific findings did not preclude appellate review of the correctness of the court's determination that Higgins could be habitualized, had Higgins chosen to seek such review. The trial court's failure to make specific findings on the record was therefore harmless.[1] Were this Court to remand this case for resentencing, the result would be "mere legal churning."

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[1] The State recognizes that the Fourth District has concluded that the Rucker harmless error analysis applies only to the findings on pardon and set aside. See Robinson v. State, 18 Fla. L. Weekly D510 (Fla. 4th DCA Feb. 17, 1993). However, the remaining findings (i.e., the timing and number of prior convictions, and, as in this case, the presence of at least one prior violent felony) are no more or less "ministerial" in nature than are the findings on pardon and set aside. Accordingly, this Court's decision in Rucker supports the State's position that the trial court's failure in the instant case to make any of the statutory findings is harmless under the circumstances of this case.

CONCLUSION

For the reasons set forth herein, the First District's decision below should be quashed.

Respectfully submitted,

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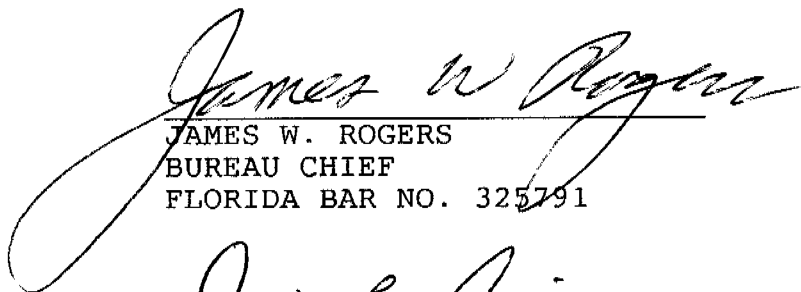

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by U.S. Mail to John C. Harrison, Equire, of John C. Harrison, P.A., P.O. Box 876, 12 Old Ferry Road, Shalimar, Florida 32579, this 12th day of March, 1992.

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